

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE JDS UNIPHASE CORPORATION  
SECURITIES LITIGATION

No. C 02-1486 CW

ORDER GRANTING  
OKLAHOMA FUND  
LEAVE TO  
INTERVENE AS  
NAMED PLAINTIFF

\_\_\_\_\_/

Proposed Intervenor Oklahoma Firefighters Pension and Retirement System (Oklahoma Fund) moves for leave to intervene as an additional named plaintiff in this securities action. Lead Plaintiff Connecticut Retirement Plans and Trust Funds has filed a memorandum in support of the motion. Defendants JDS Uniphase Corporation (JDS), Jozef Straus, Anthony R. Muller and Charles Abbe (JDS Defendants) oppose the motion to intervene. Defendant Kevin Kalkhoven joins JDS Defendants' opposition. Pursuant to the Court's July 15, 2005 order and JDS Defendants' request, the matter was taken under submission on the papers. Having considered all of the papers filed by the parties, the Court GRANTS Oklahoma Fund

1 leave to intervene.

2 BACKGROUND

3 According to the second amended consolidated complaint (SACC),  
4 JDS manufactures and supplies components of fiber-optic networks to  
5 telecommunications and cable television system providers. Messrs.  
6 Straus, Muller, Abbe and Kalkhoven are current and former executive  
7 officers and directors of JDS.

8 Lead Plaintiff purports to represent a class of persons and  
9 entities who purchased or otherwise acquired securities of JDS  
10 between October 28, 1999 and July 26, 2001. Lead Plaintiff itself  
11 purchased and sold JDS securities during that period, as did other  
12 Plaintiffs named in the SACC. See SACC, Ex. B, Listing of Other  
13 Plaintiffs and Their Counsel.

14 Lead Plaintiff alleges that, during the class period,  
15 Defendants engaged in a scheme to inflate artificially the price of  
16 JDS stock by fraudulently recognizing revenue, falsely representing  
17 that demand for JDS products was strong, and overstating the value  
18 of its inventory by failing to write off excess inventory. Lead  
19 Plaintiff further alleges that Defendants benefitted from this  
20 scheme by selling stock at inflated prices and by using the value  
21 of JDS stock to purchase other companies for less than their worth.

22 On November 4, 1999, JDS acquired Optical Coating Laboratory,  
23 Inc. (OCLI). Lead Plaintiff alleges that prior to acquiring OCLI,  
24 JDS engaged in fraudulent revenue recognition practices that  
25 artificially inflated its sales statistics and, thus, its stock  
26 price. Defendants made the OCLI acquisition by exchanging shares  
27 of stock with the acquired companies, and it was thus in

1 Defendants' best interest to keep the JDS stock price artificially  
2 high in order to secure a more favorable exchange rate. JDS's  
3 stock price increased significantly just before the OCLI  
4 acquisition. Additionally, Lead Plaintiff alleges that the proxy-  
5 prospectus that JDS filed with the Securities and Exchange  
6 Commission (SEC) in connection with the OCLI acquisition was  
7 fraudulent in that it identified strong demand based in part on  
8 JDS's faulty accounting practices.

9 Oklahoma Fund is a former OCLI shareholder. On February 4,  
10 2000, in connection with JDS' acquisition of OCLI, Oklahoma Fund  
11 exchanged 2,400 shares of OCLI for 4,454 share of JDS. Jones Decl.  
12 ¶ 4. Oklahoma Fund adopts the allegations of the SACC, including  
13 Lead Plaintiff's claims on behalf of former OCLI shareholders. Id.  
14 ¶ 7.

15 On March 27, 2002, Lead Plaintiff filed the complaint that  
16 initiated this lawsuit, one of twenty-seven related securities  
17 fraud class actions then pending before this Court. On July 26,  
18 2002, the Court held a hearing to determine which of six applicants  
19 should be appointed lead plaintiff. At the hearing, now-Lead  
20 Plaintiff Connecticut Retirement Plans acknowledged that it had not  
21 purchased or exchanged all of the securities encompassed by its  
22 complaint, and stated its intention to designate other plaintiffs  
23 to represent different subgroups. Fernandez Decl., Ex. A, July 26,  
24 2002 Hearing Tr. at 19.

25 On October 11, 2002, Lead Plaintiff filed the first amended  
26 consolidated complaint (FACC), which alleged causes of action under  
27 the Securities Act of 1933 (Securities Act) and the Securities  
28

1 Exchange Act of 1934 (Exchange Act). Defendants moved to dismiss  
2 the FACC and, on November 3, 2003, the Court issued an order  
3 denying Defendants' motion to dismiss the Securities Act claims and  
4 granting the motion to dismiss the Exchange Act claims. The Court  
5 granted Lead Plaintiff leave to amend these claims.

6 On January 9, 2004, Lead Plaintiff filed the SACC. The SACC  
7 alleges that JDS, Straus, Muller and Kalkhoven violated section 11  
8 of the Securities Act; JDS violated section 12(a)(2) of the  
9 Securities Act; Straus, Kalkhoven and Muller violated section 15 of  
10 the Securities Act; JDS, Kalkhoven, Muller, Abbe and Straus  
11 violated section 10(b) of the Exchange Act and Rule 10b-5  
12 promulgated thereunder; Kalkhoven, Muller and Straus violated  
13 section 14 of the Exchange Act and Rule 14a-9 promulgated  
14 thereunder; Kalkhoven, Muller, Straus and Abbe violated section  
15 20(a) of the Exchange Act; and Kalkhoven, Muller, Straus and Abbe  
16 violated section 20A of the Exchange Act.

17 On March 9, 2004, Defendants moved to dismiss the SACC. On  
18 January 6, 2005, the Court granted the motion to dismiss one of the  
19 Securities Act claims against Kalkhoven, and denied the motion to  
20 dismiss the remaining claims. Lead Plaintiff's motion for class  
21 certification has been noticed for November 18, 2005.

#### 22 LEGAL STANDARD

23 To intervene as a matter of right under Federal Rule of Civil  
24 Procedure 24(a)(2), "an applicant must claim an interest the  
25 protection of which may, as a practical matter, be impaired or  
26 impeded if the lawsuit proceeds without" the applicant. Forest  
27 Conservation Council v. United States Forest Serv., 66 F.3d 1489,

1 1493 (9th Cir. 1995).<sup>1</sup> The Ninth Circuit applies a four-part test  
 2 to motions under Rule 24(a). An applicant seeking intervention as  
 3 of right must show that:

4 (1) it has a significant protectable interest relating to the  
 5 property or transaction that is the subject of the action;  
 6 (2) the disposition of the action may, as a practical matter,  
 7 impair or impede the applicant's ability to protect its  
 8 interest; (3) the application is timely; and (4) the existing  
 9 parties may not adequately represent the applicant's interest.

10 Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998) (citing  
 11 Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1061 (9th  
 12 Cir. 1997), cert. denied, 524 U.S. 926 (1998)).

13 The Ninth Circuit interprets Rule 24(a) broadly in favor of  
 14 intervention. Id. In evaluating a motion to intervene under Rule  
 15 24(a), a district court is required "to take all well-pleaded,  
 16 nonconclusory allegations in the motion . . . as true absent sham,  
 17 frivolity or other objections." Southwest Ctr. for Biological  
 18 Diversity v. Berg, 268 F.3d 810, 820 (9th Cir. 2001).

19 The most important consideration in evaluating the timeliness  
 20 of a motion to intervene is whether any delay in moving for  
 21 intervention may prejudice existing parties; as long as prejudice  
 22 is not likely to result from the timing of the motion, courts  
 23 interpret the timeliness requirement liberally. See, e.g.,  
 24 Cummings v. United States, 704 F.2d 437, 439 (9th Cir. 1983)  
 25 (motion to intervene timely even though made after interrogatories

---

26 <sup>1</sup>Lead Plaintiff characterizes Oklahoma Fund as an "unnamed  
 27 class member," and suggests that intervention is proper under  
 28 Federal Rule of Civil Procedure 23(d), which permits unnamed class  
 members "to intervene and present claims or defenses, or otherwise  
 come into the action." The characterization of Oklahoma Fund as an  
 "unnamed class member" is premature, as a class has not yet been  
 certified.

1 and two weeks before date set for close of discovery). The Court  
2 considers three factors in evaluating whether a motion to intervene  
3 is timely: "(1) the stage of the proceeding at which an applicant  
4 seeks to intervene; (2) the prejudice to other parties; and (3) the  
5 reason for and length of the delay." California Dep't of Toxic  
6 Substances Control v. Commercial Realty Projects, Inc., 309 F.3d  
7 1113, 1119 (9th Cir. 2002) (quoting United States v. State of  
8 Washington, 86 F.3d 1499, 1503 (9th Cir. 1996)).

9 A court may also at its discretion permit intervention "when  
10 an applicant's claim or defense and the main action have a question  
11 of law or fact in common." Fed. R. Civ. P. 24(b)(2). In  
12 exercising its discretion, a court is to "consider whether the  
13 intervention will unduly delay or prejudice the adjudication of the  
14 rights of the original parties." Id.

#### 15 DISCUSSION

##### 16 I. Standing

17 Defendants argue that the motion should be denied because  
18 intervention cannot be used to cure an existing plaintiff's lack of  
19 standing. See Lierboe v. State Farm Mut. Auto. Ins. Co., 350 F.3d  
20 1018, 1022 (9th Cir. 2003) (vacating class certification where sole  
21 named plaintiff could not state a claim and therefore lacked  
22 standing to sue). As Lead Plaintiff notes, Defendants' standing  
23 argument is inapposite. Defendants do not claim that Lead  
24 Plaintiff's standing suffers the same constitutional defect as did  
25 the class representative in Lierboe, who never had a case or  
26 controversy sufficient to bring suit in federal court. See  
27 generally Baker v. Carr, 369 U.S. 186, 204 (1962) (explaining that

1 the gist of standing is whether plaintiffs have a personal stake in  
2 the outcome sufficient "to assure that concrete adverseness which  
3 sharpens the presentation of issues").

4       Instead, Defendants argue only that the named Plaintiffs lack  
5 standing to bring claims on behalf of the OCLI Subclass, because no  
6 named Plaintiff exchanged OCLI stock for JDS stock. In the absence  
7 of a successful motion to dismiss the case for lack of standing,  
8 the authority cited by Defendants is inapposite. Cf., e.g., Krim  
9 v. pcOrder.com, 402 F.3d 489, 495 (5th Cir. 2005) (affirming  
10 district court's dismissal of plaintiffs' claims for lack of  
11 standing under Section 11 and subsequent denial of a motion to  
12 intervene); Lidie v. State of California, 478 F.2d 552 (9th Cir.  
13 1973) ("where the original plaintiffs were never qualified to  
14 represent the class, a motion to intervene represents a back-door  
15 attempt to begin the action anew, and need not be granted").  
16 Defendants' attack on the standing of the current named Plaintiffs  
17 to bring claims on behalf of the OCLI Subclass actually bolsters  
18 the motion to intervene, because it illustrates why Oklahoma Fund  
19 seeks, in an abundance of caution, to intervene to protect its  
20 interests.

21 II. Intervention as of Right

22       Defendants do not dispute that Oklahoma Fund has a  
23 significant, protectable interest relating to the property or  
24 transaction that is the subject of this action. Defendants do  
25 contest the other three prongs of the test for intervention as of  
26 right under Rule 24(a). Defendants' arguments are taken in turn.

## 1 A. Timeliness

2 Defendants argue that the motion to intervene is untimely,  
3 based on both the length of time between the original complaint and  
4 the instant motion and the running of the statute of limitations on  
5 the claims of the OCLI Subclass.

6 As Defendants note, more than three years have passed since  
7 the filing of the original complaint, and Lead Plaintiff and  
8 Oklahoma Fund provide no justification for their delay. However,  
9 these facts alone are not dispositive, because the other relevant  
10 factors weigh in favor of allowing intervention. Despite several  
11 years of litigation, the proceedings are still at a relatively  
12 early stage: the class has not yet been certified; discovery is  
13 still underway; and the deadline for dispositive motions is not yet  
14 imminent. Oklahoma Fund is willing to rest upon the allegations of  
15 the SACC. Defendants identify no actual prejudice likely to result  
16 from the timing of the motion, apart from their allegations that  
17 the OCLI claims are time-barred. Defendants have been on notice  
18 since the July 26, 2002 hearing that Lead Plaintiff intended to  
19 designate other entities to represent different subgroups. On  
20 balance, the factors weigh in favor of granting the motion to  
21 intervene. See In re Initial Public Offering Sec. Litig., 214  
22 F.R.D. 117, 122 (S.D.N.Y. 2002) (allowing additional named  
23 plaintiffs to intervene for purposes of curing alleged pleading  
24 deficiencies where material allegations of complaint not affected  
25 and defendants had notice of plaintiffs' intentions "well in  
26 advance of the filing of their motions to dismiss"); cf. Smith v.  
27 Marsh, 194 F.3d 1045 (9th Cir. 1999) (affirming denial of motion to



1 intervene where district court found that motion occurred at a late  
2 stage in the proceedings, had been unduly delayed and if granted  
3 would cause prejudice to existing parties).

4 Defendants argue further that the motion to intervene is  
5 untimely because the statute of limitations on the OCLI claims has  
6 passed. However, the motion to intervene does not seek to add new  
7 claims to the SACC. Both the FACC and SACC already set forth the  
8 claims which Defendants now argue are time-barred, well within the  
9 limitations period alleged by Defendants to have ended on February  
10 4, 2003. None of the case law cited by Defendants suggests that  
11 intervenors cannot be allowed to bolster claims brought within the  
12 statute of limitations and not already subject to dismissal. See  
13 In re Elscint, Ltd., Sec. Litig., 674 F. Supp. 374, 378 (D. Mass.  
14 1987) (denying motion to intervene filed after court issued  
15 tentative conclusion regarding dismissal of claims); Fleming v.  
16 Bank of Boston Corp., 127 F.R.D. 30, (D. Mass. 1989) (holding  
17 motions to intervene untimely when filed after court found original  
18 plaintiff lacked standing to bring claims). The Court therefore  
19 need not reach the question of whether the statute of limitations  
20 was tolled, pursuant to Am. Pipe & Constr. Co. v. Utah, 414 U.S.  
21 538, 553-54 (1974), by the filing of the class action.

22 Defendants argue that they would be prejudiced by Oklahoma  
23 Fund's intervention and that allowing intervention would set a  
24 "dangerous precedent." Defendants' claim of prejudice rests on the  
25 the assumption that intervention would allow Plaintiffs to  
26 circumvent the statute of limitations. See Defs.' Opp. at 16  
27 ("Defendants will be prejudiced if the Court allows the Oklahoma  
28

1 Fund to intervene and revive the time-barred OCLI Claims.")

2 However, Defendants' complaint is significantly undercut by their  
3 own failure to address the potential standing issue in either of  
4 their previous motions to dismiss.

5 For these reasons, the Court finds that the motion to  
6 intervene is timely.

7 B. Impairment of Oklahoma Fund's Interests and Adequacy of  
8 Representation

9 Defendants argue that the disposition of the action will not  
10 impair or impede Oklahoma Fund's ability to protect its interests,  
11 and that the existing named Plaintiffs will adequately represent  
12 Oklahoma Fund.

13 Here, Defendants note that Oklahoma Fund and Lead Plaintiff do  
14 not concede that Lead Plaintiff lacks standing to represent the  
15 OCLI Subclass, and argue that failure to concede this fact is fatal  
16 to a motion for mandatory intervention. Defendants also argue that  
17 Oklahoma Fund's interests are already being pursued in State court  
18 in Pang v. Dwight, Case No. 231989 (Sonoma County Sup. Ct., filed  
19 Feb. 3, 2003).

20 The standard for intervention as of right is only whether  
21 disposition of an action "may, as a practical matter, impair or  
22 impede the applicant's ability to protect its interest" and whether  
23 "existing parties may not adequately represent the applicant's  
24 interest." Donnelly, 159 F.3d at 409 (emphasis added). The Ninth  
25 Circuit's language does not suggest that proposed intervenors must  
26 concede that their interests will certainly be harmed. Moreover,  
27 Defendants provide no authority for the proposition that proposed  
28

1 intervenors must concede that intervention is essential, or that  
2 the availability of State remedies obviates the need for  
3 intervention. The fact that the parties dispute the validity of  
4 the OCLI Subclass' claims is sufficient to show both that  
5 disposition of the action may impair or impede Oklahoma Fund's  
6 interest, and that the current named Plaintiffs may not adequately  
7 represent that interest.

8 For the foregoing reasons, the Court finds that Oklahoma Fund  
9 may intervene as of right, pursuant to Rule 24(a). It does not  
10 reach the issue of permissive intervention.

11 III. Futility

12 Defendants maintains that Oklahoma Fund's intervention is  
13 futile because it is subject to a unique defense and therefore it  
14 cannot be an adequate representative of the OCLI Subclass. Lead  
15 Plaintiff and Oklahoma Fund argue that futility is irrelevant to  
16 the motion to intervene. The Court agrees. Oklahoma Fund's  
17 adequacy as a representative of the OCLI Subclass is more properly  
18 tested in the context of the motion for class certification.

19 CONCLUSION

20 For the foregoing reasons, the Court GRANTS Lead Plaintiff's  
21 motion (Docket No. 289) and allows Oklahoma Fund to intervene as a  
22 named Plaintiff in this action.

23 IT IS SO ORDERED.

24 Dated: 10/12/05



25  
26 CLAUDIA WILKEN  
United States District Judge

**United States District Court**  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28